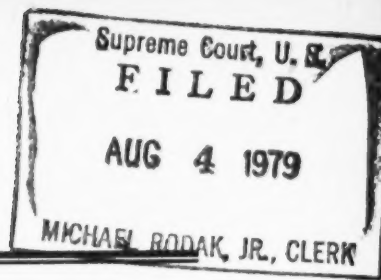


79-189



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1978.

No.

ANGELO JOSEPH MERCURIO,
RICHARD FLORAMO, PHILIP V. CORSO,
BURTON RHODES,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.**

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RESPONDENT.

Petition for a Writ of Certiorari to the United States
Court of Appeals for the Third Circuit.

Petitioners, Angelo Joseph Mercurio, Richard Floramo, Philip V. Corso and Burton Rhodes, by their attorneys, pray that a Writ of Certiorari be issued to review the Judgment Orders of the United States Court of Appeals for the Third Circuit entered on June 11, 1979. Said Judgment Orders were issued in lieu of a formal mandate on July 3, 1979.

Opinion Below.

The Judgment Orders of the court below printed in Appendix A hereto, infra, pp. 33-40 are not yet reported.

Jurisdiction.

The jurisdiction of this court rests on 28 U.S.C. § 1254(1).

Questions Presented.

I. Whether the District Court erred in allowing into evidence hearsay statements of a co-conspirator, impliedly implicating the Petitioners, over the objection of defense counsel, absent a showing by independent evidence (exclusive of the hearsay) that said statements were made: (1) while the conspiracy existed; (2) that the Petitioners and the decalarant were members of the conspiracy; (3) that the declarations were made during the course and in furtherance of the conspiracy.

II. Were the rights of the Petitioners Corso and Floramo to be protected against unreasonable searches and seizures under the Fourth Amendment violated when they were arrested by the Respondent, without warrant, in the absence of probable cause; did the admission into evidence of the items seized from Petitioners Floramo and Corso at the time of said arrests deprive all Petitioners of their rights to a fair trial in violation of their rights to due process of law under the Fifth Amendment?

Constitutional Provisions Involved.

Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

On September 8, 1977, the Petitioners Floramo, Mercurio, Corso and co-defendant Winston were arrested and initially brought before the Magistrate. On September 14, 1977, the Petitioners were indicted in the United States District Court for the Western District of Pennsylvania, for violations of 18 U.S.C. §§ 2, 371, 2314 and 2315. In addition, the Petitioner Floramo was indicted for violation of 18 U.S.C. § 922(k) and § 924(c). Petitioner Corso was additionally indicted for violation of Title 18, Appendix, U.S.C. § 1202(a)(1) and 18 U.S.C. § 924(c).

All defendants were subsequently arraigned on September 21, 1977. On January 31, the Petitioners Mercurio Corso and Floramo filed various motions. Included therein was a Motion to Suppress the seizure of firearms on September 8, 1977. On February 10, 1978, a superseding indictment was filed which added an additional defendant,

Matthew McGrath. On April 3, 1978, in response to a Motion to Sever, filed on behalf of the defendant Winston, the court ordered that the drug conspiracy alleged in Count One of the original and superseding indictments and Count Nine, charging a substantive violation of 21 U.S.C. § 846 be severed from the original indictments and treated separately.

On May 8, 1978, a pre-trial hearing was held on all outstanding motions, including but not limited to Petitioners' Motions to Suppress. On May 15, 1978, the defendant Winston began trial before the Honorable Barron P. McCune and a jury on the portions of the superseding indictment which had been severed. The defendant Winston was convicted on May 17, 1978. On May 19, 1978, the court granted defendant Winston's Motion to Dismiss the remainder of Count One on the basis of double jeopardy.

On May 23, 1978, defendant Winston along with all other defendants began trial before Judge McCune and a jury. The trial concluded on June 14, 1978, at which time the jury returned verdicts of guilty as follows: Petitioner Mercurio was found guilty as to Counts One, Two, Three and Four; Petitioner Rhodes was found guilty as to Counts One, Two, Three and Four; Defendant Winston was found guilty as to Counts Two, Three and Four; Defendant McGrath was found guilty as to Count One; Petitioner Floramo was found guilty as to Counts One, Four and Five, and not guilty as to Counts Two, Three and Seven; Petitioner Corso was found guilty as to Counts One, Four and Six, and not guilty with regard to Counts Two, Three and Eight.

The defendants were subsequently sentenced on July 6, 1978. On July 18, 1978, all defendants filed a notice of appeal to the appellate court below.

Statement of Facts.

The investigation which eventually ended in the promulgation of the instant indictment began when three agents (Ross, Thurston and Macready) began an undercover investigation to ascertain persons dealing in and transporting stolen securities interstate.

The investigation began with a conversation with James Abel in early July of 1977. Thereafter, Abel introduced the agents to Robert Winston and a meeting was set up for July 26, 1977 to take place in Pittsburgh, Pennsylvania. The conversations between the agents, Winston, James Abel, and Robert Globerman, were electronically recorded. During the course of the July 26 meeting, the parties thereto negotiated to buy and sell stolen securities. The conversations transpired between Winston, Abel, Globerman and the agents. The Petitioners Floramo, Corso, Mercurio, Rhodes and defendant McGrath were neither present at this meeting, nor were their names mentioned in relation to the negotiations being conducted.

A subsequent meeting was scheduled for August 26, 1977 in Ft. Lauderdale, Florida. The purpose of this meeting was to make final negotiations for the purchase of securities and to view samples. At this meeting, Winston complained because agent Thurston had accompanied agent Ross. At this time, agent Thurston was unknown to Winston. The discussions at the August 26 meeting revolved around the purchase of stolen securities as distinguished from duplicate or blank securities.

Another meeting was scheduled for August 30, 1977 in Pittsburgh, Pennsylvania. This meeting was electronically recorded. The August 30 meeting again involved discussions between Winston and the agents, concerning the sale by him of stolen securities. Agent Ross was particularly concerned that the items that they were negotiating to

purchase were not the duplicate certificates which they had previously discussed on July 26, but rather stolen certificates. During the course of the discussions, Winston attempted to have Ross travel to Florida to pick up the certificates. Ross refused to leave the Pittsburgh area.

In the response thereto, Winston stated:

If I come into your area, I gonna have a god damn army with me. That's the only thing. I don't want to bring a crowd. I mean, this guy (inaudible) and I am going to have somebody watching out for my own interest. That's the only thing.

Further on in the discussions, Winston stated in response to discussions that both individuals, Ross and Winston, have complete security. Winston stated:

I tell you what I'm gonna do. I mean, I got four of my buddies. And you are going to have four of your buddies, that gives (inaudible). No, I have to be extremely careful because besides doing this, I have to watch out for my other hoodlum friends.

Further in the negotiations, Winston explained to Ross that he needed bond powers to make the instruments that were going to be purchased negotiable. Winston explained that he would be able to transact business within the next five business days. The remainder of the negotiations on August 30 dealt with the manner in which the transfer would be handled. Before concluding the negotiations, Winston and Ross again discussed their dislike for having other people involved. Ross stated:

I don't want a crowd. That's my problem. You, you see, where would I find five men that are, I mean, you know, that's five more people who know what we're doing.

Winston responded:

Yeah, I agree with you. It, it's . . . five more people you got to pay. And that's five more people you got to worry about getting greedy and blowing your head off. Okay.

At the conclusion of the meeting, Winston showed Ross a sample of a certificate he intended to transfer to him. At this time, Winston showed Ross a photocopy of a Putnam Fund, Income Fund Certificate. The certificate which Ross saw was in the name of Lois H. Wiley for 1254 shares. Just prior to the conclusion of the meeting, Winston stated that he had to leave because he had to take his buddy to the airport. Shortly thereafter, the meeting concluded.

Ross next saw Winston on September 6, 1977 in Pittsburgh, Pennsylvania. They met at the Hilton Hotel. Agents Macready and Thurston accompanied Ross. Again, negotiations transpired relative to the manner in which transfer would occur. It was agreed that the transfer would occur over a period of several days in installments. At 9:30 a.m. on September 6, 1977, Ross called Winston and informed him that the money was available at his bank. Ross again met with Winston on September 7, 1977 at the Hilton Hotel. Winston was prepared to transact business on September 7, 1977. Because Ross was late (arriving at 12:30 p.m. as compared to 9:30 a.m. as planned) Winston informed him that they could not transact business on that day because the securities were at least a four hour drive from there. A meeting was set up for September 8, 1977 at approximately 11:30 a.m.

Agents Ross, Thurston and Macready arrived at the hotel at approximately 11:25 a.m. on September 8, 1977 and after calling Winston on the house phone, they reconnoitered the area to look for people who might be surveilling on Winston's behalf.

Almost immediately after talking to Winston on the house phone, they encountered the Petitioner, Angelo Mercurio. When the agents first saw Mercurio:

He looked a little startled that we had come around the corner and he immediately turned abruptly and faced a display window.

Almost immediately thereafter, the agents observed Petitioner Corso. When Ross looked at Corso and made eye contact, Corso abruptly turned around and gazed into a display window. The agents went into the mens room and transmitted the descriptions of the individuals they had observed. Upon exiting, they again encountered Petitioners Mercurio and Corso.

Shortly thereafter, the agents met with Winston in the restaurant of the hotel and had further discussions as to the manner in which the securities would be transferred. The agents left the restaurant and proceeded to the lobby of the hotel and again noticed Corso and Mercurio and a third individual in a black suit sitting in a seating area of the lobby. The agents took seats in the lobby and while sitting, observed Mercurio and the individual in the black suit standing on the stairway on the first landing, leading to the second floor. The agent now identified the man in the black suit as Petitioner Floramo. When they made eye contact, the Petitioners jumped out of the agent's line of sight. Almost immediately thereafter, Agent Ross saw Petitioner Corso walking through the lobby towards the house phone. Corso walked past the path of Winston, who was now heading towards the agents, carrying a large attache case. Winston sat down with the agents and showed them the securities. While examining the securities, agent Ross again observed Mercurio and Floramo at the top of the stairs. Again, when their eyes made contact, Mercurio and Floramo jumped out of sight. Thereafter, the

individuals got up and began walking towards the exit, and pursuant to prearrangement, agents Ross and Thurston and defendant Winston were arrested.

The arrest had been prearranged so that each of the three agents, Ross, Thurston and Macready, would be arrested. However, because of some difficulties which had arisen, an arrest was effectuated only with regard to Ross, Thurston, and the defendant Winston. Thereafter, agent Macready exited from the building. Prior to exiting, he observed Petitioners Mercurio and Floramo still standing at the top of the staircase. At the time, he observed that Floramo had an airline travel bag over his right shoulder.

Agent Macready thereafter left the building looking for assistance from other agents who were assigned to surveillance. When he didn't find any help, he returned inside and upon returning, saw Petitioners Floramo, Mercurio, and Corso by the house phones. They appeared to be talking. Agent Macready again left the building and while walking around the hotel back towards the front doors, he observed Floramo and Corso standing by a taxicab. He heard Corso say to Floramo:

What's going on, what's going on?

He heard Floramo answer back:

I don't know, I don't know what's going on.

At the same time, he saw Petitioner Mercurio in the middle of the street looking towards the automobile in which defendant Winston and agents Ross and Thurston had been placed. Shortly thereafter, agent Macready came across agent O'Donnell of the F.B.I who was walking down the street and stated:

The guy in the plaid suit, the light blue suit and the black suit, get them, arrest them.

Agent O'Donnell observed three individuals conversing around a cab. As agent O'Donnell walked towards the

three individuals, two individuals got into the cab and a third individual walked away. When O'Donnell got to the cab, he extended the upper half of his body into the cab, exhibiting his credentials, and told the individuals:

Freeze, don't move and slowly move out of the cab, keeping your hands in view at all times.

While at the cab, agents Paskowitz and Stewart came to the aid of O'Donnell. When getting out of the cab, Floramo had with him a maroon travel bag. Agent Paskowitz took this bag from him and handed it to O'Donnell. As Floramo got out of the cab, Paskowitz immediately took him to search him. As a result of the search, two handguns were taken from the person of Richard Floramo.

The search of Floramo occurred prior to any conversation with him and immediately upon his exiting the taxicab. When the agents got back to the office, they inventoried the items in the maroon bag which had been taken from Floramo. They found therein ammunition, surgical gloves, and various clothing. Immediately upon Corso exiting the cab, he was searched by agent Stewart, who found on his person a handgun.

Agent Duffy encountered defendant Mercurio after he had walked away from the taxicab and immediately frisked him. He removed from his person a set of keys, some cash, and a pair of gloves. He thereafter began asking him questions. He attempted to identify Mr. Mercurio, who supplied a Massachusetts driver's license with his picture on it, and an automobile registration. The license indicated that Mr. Mercurio was from Woburn. He then asked Mr. Mercurio what he was doing in Pittsburgh, whereupon Mercurio responded that he had arrived that morning from Boston and that he had taken a cab from the airport to the hotel. Mercurio further stated that he had no luggage or clothing and that whatever he needed,

he intended to buy while in Pittsburgh. Agent Duffy inquired of Petitioner Mercurio whether he knew defendants Corso and Floramo, who were still standing by the cab during this conversation. Mercurio denied knowing them. Mercurio was then taken to the F.B.I. office in down town Pittsburgh. While at the F.B.I. office, additional papers with notations on them were taken from the possession of Mercurio. One such paper had the name of Petitioner Phil Corso on it. Another of those papers had the name Richard Martin with the notation, Hilton, down town Pittsburgh, 1209, telephone no. 391-4600.

Also taken from Mercurio was a piece of paper which had written on it the telephone number (305) 764-0935, Rhodes' home telephone number, and under it, the name "Burt."

Mercurio was identified as having been present in the room 1205 of the Hilton Hotel, in the company of Winston on September 8, 1977. At the time of this observation, the surveilling agent testified that he had seen Mercurio carrying a valise prior to his entrance into the room. After the arrest of Winston in the lobby of the hotel, rooms 1205 and 1209 were searched. The search revealed a prescription bottle with the name "Burt Rhodes" on it. In a further search of the rooms, a telephone address book with the names "Bob Globerman" and "Burt Rhodes" was found. At trial, evidence was produced which showed that Rhodes and Winston had rented safety deposit boxes in the Mellon Bank on September 8, 1977, and also the Equibank on the same date. The Petitioner Rhodes was arrested on or about September 15, 1977 at the Mountforie Hospital. At the time of his arrest, he denied knowing the Petitioners Corso, Floramo, Mercurio and McGrath. There was evidence adduced at trial that Rhodes and Corso had lived together in Massachusetts. Also, there was evidence

from telephone toll records indicating that there were phone calls placed from numbers associated with Rhodes and Winston to numbers associated with Corso and Mercurio during August and early September of 1977.¹

The briefcase seized from Winston on September 8, 1977 contained 94 original certificates, with a total of 2,205,945 shares. Five "Putnam" funds were represented as follows: 20 Putnam Vista certificates; 19 Putnam Growth certificates; 20 Putnam Income certificates; 18 George Putnam certificates; and 17 Putnam Investors certificates. The total face value of the 94 certificates was \$23,226,599.29. These certificates were discovered to be part of a group of approximately 1,100 certificates missing from a third-floor room, in which a supply of blank certificates were stored in boxes, at the offices of Putnam Administrative Services in Boston, Massachusetts. Included among the certificates found to be missing was a complete box of 1,000 Putnam Income certificates.

A. M. Accetta, an employee of Putnam Administrative Services who was authorized to sign Putnam certificates and whose name appeared on Winston's 94 certificates, testified that she did not sign any of them and that she had not authorized anyone to sign her name. Moreover, there was evidence that no Putnam certificate was valid unless it was signed in ink by an authorized person and that the signature of A. M. Accetta on Winston's certificates appeared to be a facsimile signature, i.e., a rubber

¹ The Petitioners Rhodes and Mercurio testified on their own behalf at trial. Both Rhodes and Mercurio admitted that there had been conversation between them and that Rhodes had arranged for Mercurio and Corso to act as protection for Winston during a big business deal in Pittsburgh and that Mercurio and Corso were at the Hilton Hotel on September 8, 1977 as guards for Winston. However, each defendant denied knowing that Winston's transaction involved stolen or counterfeited securities or further that said business deal was in any way illegal.

stamp. In addition, while almost all of Putnam's certificates are printed by a computer, Winston's certificates appeared to have been typed. In the opinion of a company executive, these certificates were forged and counterfeited.

There was evidence that the shareholders whose names appeared on Winston's certificates were actual Putnam shareholders but that the number of the shares listed on Winston's certificates were significantly higher than these shareholders' actual holdings. Finally, a transfer book, #7709, which contained a record of all transactions in the various Putnam funds from August 9 to August 26, 1977, was discovered missing from the research department at Putnam. All the names of customers and account numbers on Winston's certificates were recorded in transactions appearing in the missing transfer book.

Reasons for Granting the Writ.

I. THE DISTRICT COURT ERRED IN ALLOWING INTO EVIDENCE HEARSAY STATEMENTS OF A CO-CONSPIRATOR, IMPLIEDLY IMPLICATING THE PETITIONERS, OVER THE OBJECTION OF DEFENSE COUNSEL, ABSENT A SHOWING BY INDEPENDENT EVIDENCE (EXCLUSIVE OF THE HEARSAY) THAT SAID STATEMENTS WERE MADE: (1) WHILE THE CONSPIRACY EXISTED; (2) THAT THE DEFENDANT AND THE DECLARANT WERE MEMBERS OF THE CONSPIRACY; (3) THAT THE DECLARATIONS WERE MADE DURING THE COURSE AND IN FURTHERANCE OF THE CONSPIRACY.

The evidence produced at trial in the instant cause showed the negotiations, and attempted sale, by defendant Robert Winston, Robert Globberman, and James Abel (hereinafter referred to as Winston, Globberman and Abel) with undercover agents Ross, Macready and Thurston. The substance of the government's case against the Petitioners

involved, in the main, conversations between Winston and the F.B.I. agents. The conversations transpired during six prearranged meetings on July 26, August 26, and September 6, 7, and 8 of 1977. Two of these conversations, July 26 and August 30, 1977, were electronically recorded and subsequently admitted into evidence and played to the jury. The record is clear and convincing that the Petitioners were neither present nor were their names mentioned at any of the meetings between the F.B.I. agents and defendant Winston.

The rule of the Third Circuit with regard to the admission of a co-conspirator's hearsay statements prior to the adoption of the new federal rules of evidence is succinctly expressed in *United States v. Bey*, 437 F. 2d 188 (3d Cir. 1971). The *Bey* court recognized that hearsay statements are inadmissible when no independent evidence links the declarant to the defendant. The new Federal Rules of Evidence, Rule 801(d)(2)(E), allows the admission of hearsay statements of a co-conspirator when they are made in furtherance of the conspiracy and in the course of the conspiracy. However, prior to the admission of the hearsay statements, the Government must show: (1) that a conspiracy existed; (2) that the defendant and the declarant were members of the conspiracy; and (3) that the declarations were made during the course and in furtherance of the conspiracy.

The offering of a co-conspirator's out-of-court statements presents a preliminary question of admissibility for the trial judge under Rule 104(a). *United States v. Trowery*, 542 F. 2d 623, 626-627 (3d Cir. 1976), *cert. denied* 429 U.S. 1104 (1977); and 1 Weinstein and Berger, *Evidence*, ¶104[05] at 104-40-104-41 (1977).

The quantum of proof necessary to demonstrate a defendant's involvement in a conspiracy sufficiently to admit a co-conspirator's statements has been subtly but signifi-

cantly changed by the new federal rules of evidence. *United States v. Bell*, 573 F. 2d 1040 at 1043 (8th Cir. 1978). See also, *United States v. Petrozziello*, 548 F. 2d 20 at 22-23 (1st Cir. 1977) *United States v. Trotter*, 529 F. 2d 806 at 811 (3d Cir. 1976). The threshold inquiry by the court into the factual element of admissibility must establish that the independent evidence (exclusive of the hearsay statements) establishes the defendant's complicity in the conspiracy by a *preponderance of the evidence*. *United States v. Trowery*, *supra* at 627; *United States v. Trotter*, *supra* at 811-812; *United States v. Hopkins*, 518 F. 2d 152 at 156 (3d Cir. 1975); *United States v. James*, 576 F. 2d 1121 at 1130-1131 (5th Cir. 1978); 1 Weinstein and Berger, *Evidence*, ¶104[05] at 104-42, 104-44.2, 104-44.4 (1977).

Thus, the hearsay statements of a co-conspirator cannot be admitted unless it is established that a preponderance of the independent evidence links the defendant to the declarant and the conspiracy. *Glasser v. United States*, 315 U.S. 60 at 74 (1942); *United States v. Hopkins*, *supra* at 156; *United States v. Rodrigues*, 491 F. 2d 663 at 665 (3d Cir. 1974).

This standard of preponderance of evidence, although contrary to that expressed by Judge Weinstein in his treaties, appears to be the standard followed by the various Circuit Courts when determining the quantum of evidence necessary for the admission of a co-conspirator's hearsay statements. In *United States v. Bell*, *supra* at 1044, the court stated:

[A]n out-of-court statement is not hearsay and is admissible if on the independent evidence the district court is satisfied that it is more likely than not that the statement was made during the course and in furtherance of an illegal association to which the declarant and the defendant were parties.

In *United States v. Enright*, 579 F. 2d 980 (6th Cir. 1978), the court aligned itself with the holding and the logic of the First Circuit in *Petrozziello, supra*. The court went on to say that the prima facie standard (expressed in *United States v. Bey, supra*) of evaluating the independent evidence to determine the admissibility of a co-conspirator's statement was no longer viable. However, the court could not follow the standard of beyond a reasonable doubt expressed by Weinstein and chose instead to use the ordinary civil standard of preponderance of the evidence. The *Enright* court, in following this standard, stated:

We believe that the ends of justice and the sense of the rule itself are preserved by the First Circuit's construction [i.e., preponderance of the evidence].

United States v. Enright, supra at 986.

In the instant cause, as in most conspiracy trials involving multiple defendants, the Government offered into evidence out-of-court statements of a co-conspirator prior to proving that each defendant was connected to the conspiracy. On each such instance, the Petitioners' counsel objected and requested a limiting instruction.

In order to determine the propriety of the admission of the complained of hearsay statements, the District Court was required, pursuant to the cases hereinabove cited, to make a preliminary determination of whether there existed sufficient independent evidence which established by a preponderance of the evidence, the Petitioners' involvement in the conspiracy, that the statements were made in furtherance of and in the course of the conspiracy and the Petitioners' connection with the declarant.

The instant case involved a covert operation by the Federal Bureau of Investigation to identify and seek out persons dealing with and transporting stolen securities interstate. The investigation upon which the indictments in question were eventually promulgated began in early July of 1977. The investigation was eventually culminated two months later by the arrest of the defendant Winston on September 8, 1977 in Pittsburgh, Pennsylvania. During the intervening period, undercover agents of the F.B.I. conducted several meetings with co-conspirator Winston in an attempt to negotiate the sale of stolen securities. In that vein, a meeting was conducted on July 26, 1977 with agents Ross and Macready of the F.B.I., Winston, James Abel, and Robert Globerman. This particular meeting was electronically taped. At the time of this meeting, the Petitioners were neither present, nor were their names mentioned. A subsequent meeting was held on August 26, 1977 by the F.B.I. agents and Winston. Again, Petitioners were neither present, nor were their names mentioned during the course of this meeting. A third meeting was held on August 30, 1977 between agents of the F.B.I. and Winston. Similarly, Petitioners were neither present, nor were their names mentioned during the course of this meeting. The substance of all of these conversations between Winston and the F.B.I. agents, which occurred outside the presence of the Petitioners, were admitted into evidence over objection of Petitioners' counsel.

On or about September 6, 1977, the investigating agents ascertained that Winston had come to Pittsburgh and checked into the Pittsburgh Hilton Hotel. It was learned that Winston was assigned rooms 1205 and 1209. On the same date, agents of the F.B.I. were assigned to take up surveillance positions in two rooms across the hall from rooms 1205 and 1209. The purpose of the surveillance was to observe activity going into and out of Winston's

rooms. The surveillance continued on September 6, 7, and 8, 1977. This surveillance showed that the Petitioners neither went into nor out of the rooms assigned to Winston on September 6, 7, or 8, 1977.

Notwithstanding the surveillance being conducted, agents Ross, Thurston and Macready continued to meet and negotiate with defendant Winston. They met on September 6, 1977 at which time Petitioners were neither present nor were their names mentioned. Likewise, on September 7 and 8, 1977, similar meetings occurred between the F.B.I. and Winston. At neither of these meetings were the Petitioners present, nor were their names mentioned.

During the course of the August and September meetings, it was determined by and between the parties that the securities would be taken to Pittsburgh and sold to the agents in Pittsburgh on or about September 7, 1977. On September 6, 1977, Winston indicated to the agents that an associate of his had transported from New York City 23 million dollars worth of stolen securities. This particular information was used by the agents to seek a search warrant to search the rooms occupied by Winston in the Hilton Hotel in Pittsburgh, Pennsylvania. The Affidavit which accompanied the search warrant indicated that the agents had probable cause to believe that the stolen securities were in rooms 1205 and 1209 on September 6, 1977. The search warrant was sought on September 7, 1977.

The negotiations eventually culminated with the agreement between the parties that the agents would view the securities brought by Winston in the lobby of the Hilton Hotel at approximately 11:30 a.m. on September 8, 1977.

The Government introduced evidence which indicated that while in the Hilton Hotel on September 8, 1977, the

agents of the F.B.I. reconnoitered the lobby to determine if there were any individuals there who might be associated with Winston.

During the course of this reconnoitering, they made observations of two individuals, Petitioners Corso and Mercurio. With regard to these individuals, agents testified that they believed these individuals were watching them. They further testified that their activities appeared to be suspicious. The agents first saw the Petitioners in the lobby of the Hilton Hotel at 12:05 p.m. on September 8, 1977. Petitioners were seen on three separate occasions by the agents in the course of five minutes. At 12:20 p.m., on September 8, 1977, the defendant Winston was arrested passing to the agents of the F.B.I. stolen stock certificates. Thereafter, the Petitioners were observed adjacent to a phone bank. The agents testified that although they appeared to be having a conversation, they could not overhear what was transpiring. Shortly thereafter, the Petitioners were seen outside the Hilton Hotel, standing alongside a taxicab. The agents again testified that the individuals appeared to be having a conversation, but the agents were unable to testify relative to the nature of that conversation. Within moments, the Petitioners were taken out of the cab by agents of the F.B.I. and searched. When arrested, on their persons were found firearms.

There was further evidence adduced at trial that the Petitioners resided in Massachusetts. Also, the securities, which were eventually obtained from Winston, were from the Putnam Company of Boston, Massachusetts. Further, there was evidence adduced at trial that Petitioner Mercurio was observed in room 1205 with Winston at approximately 11:00 a.m. on September 8, 1977. Further, that Mercurio had been observed with a valise when entering room 1205. Lastly, there was evidence

presented which indicated that the Petitioner Floramo knew the Petitioner Mercurio for approximately ten years.

The Petitioners contend that the independent evidence as enumerated hereinabove was insufficient to prove by a preponderance of the evidence that they knowingly conspired or confederated with any other Petitioner named in the indictment to transport or conceal forged securities interstate. The Petitioners submit:

"The offense of conspiracy consists of an agreement by the conspirators to commit an offense, attended by an act of one or more of the conspirators to effect the object of the conspiracy."

United States v. Hutchinson, 488 F. 2d 484 at 490 (8th Cir. 1973).

The Petitioners further submit that evidence of mere association with a perpetrator of a crime either shortly before or shortly after a crime is not sufficient to support a conviction. *United States v. Grose*, 525 F. 2d 1115 at 1120 (7th Cir. 1975). See also, *United States v. Carengella*, 198 F. 2d 3 (7th Cir. 1952). It is essential that the proof against each defendant must be individual and personal. *United States v. DeCavalcante*, 440 F. 2d 1264 at 1275 (3d Cir. 1971); *United States v. Klein*, 515 F. 2d 751 (3d Cir. 1975). Mere association with conspirators or knowledge of the illegal activity is not sufficient to prove a defendant's complicity. *United States v. Prince*, 515 F. 2d 564 at 567 (5th Cir. 1975); *United States v. Rosa*, 404 F. Supp. 602 (W.D. Pa. 1975). The Petitioners' activities in the independent evidence submitted against them do not rise to the level of proving by a preponderance of the evidence that they were involved in the conspiracy. As such, the admission into evidence of hearsay statements of a co-conspirator over objection were highly inflammatory and had a great potential for prejudicing the jury against the Petitioners.

Thus, the court's repeated refusals to grant Petitioners' motions for limiting instructions are grounds for reversal of their convictions.

II. THE RIGHTS OF PETITIONERS CORSO AND FLORAMO TO BE PROTECTED AGAINST UNREASONABLE SEARCHES AND SEIZURES UNDER THE FOURTH AMENDMENT WERE VIOLATED WHEN THEY WERE ARRESTED BY THE RESPONDENT, WITHOUT WARRANT, IN THE ABSENCE OF PROBABLE CAUSE; AND THE ADMISSION INTO EVIDENCE OF THE ITEMS SEIZED FROM PETITIONERS FLORAMO AND CORSO AT THE TIME OF SAID ARRESTS DEPRIVED ALL PETITIONERS OF THEIR RIGHTS TO A FAIR TRIAL, IN VIOLATION OF THEIR RIGHTS TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT.

On February 2, 1978, the Petitioners filed a Motion to Suppress statements and property seized from them on September 8, 1977. An evidentiary hearing was held on May 6, 1978. In the Petitioners' Motion, they urged the court to suppress the items seized from them and statements made by Petitioners on September 8, 1977, contending that the Government lacked sufficient probable cause to justify their arrest and the search which was conducted pursuant thereto.

The evidence elicited at the suppression hearing with regard to the Petitioners amounted to observations made by agents Ross and Macready in the lobby of the Hilton Hotel in Pittsburgh, Pennsylvania, at or about 12:00 o'clock noon on September 8, 1977. The testimony at the suppression hearing included statements by agent Ross concerning his negotiations with defendant Winston on July 26, August 26, August 30, September 6, 7, and 8, 1977. (See Statement of Facts, *supra*.)

Specifically, with regard to Floramo, agent Ross testified that Winston had told him that he had called four hoodlum friends and that he would have an army with

him when he made the transaction. When Ross and Macready arrived at the Hilton Hotel on September 8, they looked around the lobby area for people conducting counter-surveillance. Ross got to the hotel and immediately called Winston on the house telephone. After hanging up Ross and Macready began looking for people who might be on the scene on Winston's behalf. Almost immediately, the agents encountered Petitioner Mercurio. When the agents observed Mercurio, he was obviously startled and turned abruptly and looked into a display window. Almost immediately after seeing Mercurio, the agents encountered Petitioner Corso. Corso's behavior was identical to that of Petitioner Mercurio.

After making these observations, the agents observed a third man dressed in a green sportcoat and black pants, whose actions were similar to those of Petitioners Corso and Mercurio.

Thereafter, the agents went into a mens room and broadcast the descriptions of the three persons they had observed.

After leaving the mens room and heading back towards the main lobby, the agents again encountered Mercurio and Corso who behaved in similar fashion to the observations made earlier.

The agents proceeded into the restaurant to meet Winston as had been prearranged over the phone. They communicated the descriptions of the three persons they had observed to F.B.I. agents Marcolini and Durran, who were stationed in the hotel restaurant. Thereafter, the meeting with Winston took place.

The meeting with Winston had concluded with Winston stating:

Well, why don't you get a nice quiet place in the lobby and I'll get them and bring them down.

[Winston speaking about the securities.] The agents thereupon proceeded into the main lobby. When entering the lobby, agent Ross again encountered Petitioners Mercurio and Corso and the individual in the green jacket.

At the same time, agent Ross saw Floramo, who was approximately three feet away from where Mercurio and Corso and the man in the green jacket were sitting. The agents took up a sitting position in the lobby such that agent Ross was facing the front entrance. From this vantage point, he could observe the staircase leading up to the second floor. Agent Macready was seated opposite agent Ross with his back towards the main door and the staircase leading up to the second floor.

While seated, agent Ross glanced up the stairs leading up to the second floor and observed Petitioners Mercurio and Floramo at the top of the stairs watching them. When their eyes made contact, Floramo and Mercurio jumped out of the agent Ross' line of sight. When this occurred, agent Ross told agent Macready:

The guy in the blue suit and the guy in the black suit are up there at the top of the stairs jumping around like a couple of jack rabbits. Don't turn around and look at them.

Petitioner Floramo was dressed similarly to Petitioners Corso and Mercurio. Ross told agent Thurston to broadcast the descriptions of the three persons he saw at the top of the stairs.

Shortly thereafter, agent Ross observed Petitioner Corso who was moving across the main lobby towards the house phones. Almost immediately, the agent observed defendant Winston coming from the elevators towards the seats which were occupied by the agents. Winston had with him a briefcase. Winston came over to the table and showed the agents the securities. Agent Ross pulled a

certificate out of the envelope and held it up to look at it. At that time, he again observed Petitioners Mercurio and Floramo at the top of the stairs, who appeared to be looking at him. Mercurio and Floramo again jumped back out of his line of vision. When agent Ross was holding the certificates up, defendant Winston stated:

Boy, you are making me nervous with that.

In response thereto, agent Macready stated:

Well, what is the problem? We are just making a legitimate deal and we should act that way.

Thereafter, agent Ross gave a prearranged signal for the backup agents to move in and make an arrest. Pursuant to this signal, agents Thurston and Ross and defendant Winston were arrested. Agent Macready escaped. The observations of agent Macready with regard to the Petitioner Floramo in the lobby of the Hilton Hotel on September 8, 1977, prior to the arrest of agents Ross and Thurston and defendant Winston, were similar to, if not identical with, the observations made by agent Ross.

At the time the arrest was being effectuated on agents Ross and Thurston and defendant Winston, agent Macready continued to walk towards the front door. As he did so, he looked up the stairs and saw Petitioners Mercurio and Floramo. He observed that the Petitioner Floramo had a brown satchel over his arm. The defendants appeared to be looking for him.

Agent Macready left the hotel in order to seek out other F.B.I. agents who could assist in effectuating arrests. When he didn't find anybody, he came back into the lobby approximately fifteen seconds later and observed the man in the green jacket, Petitioners Mercurio, Corso and Floramo standing together. Agent Macready then proceeded through the hotel towards the back of the building and came around the building from the outside. As he turned the corner of Liberty Avenue, heading towards

the front of the hotel, he observed Petitioners Floramo and Corso at a taxicab stand on the side of the hotel. As he passed them, he overheard Petitioner Corso say to Petitioner Floramo:

What's going on?

He heard Petitioner Floramo respond:

I don't know. I don't know what is going on.

As he passed the cab, agent Macready observed defendant Mercurio in the middle of the street at the front door on his toes, craning his neck to see what was going on with Winston and Ross.

Shortly thereafter, as he arrived at the front door of the hotel, agent Macready saw two F.B.I. agents running towards him. He told the agents:

The guys in the plaid suit, black suit, and light blue suit, arrest them.

Agent Edward Stewart was assigned to surveillance with regard to the instant investigation and was told that there would be certain individuals there that were to be arrested on that day (September 8, 1977).

He recalled having received one transmission from the 12th floor which indicated a stocky male with a briefcase in a light suit had entered one of the rooms being surveilled on the 12th floor. He further heard descriptions of four individuals transmitted by agent Ross, describing a man in a brown plaid suit, a man in a blue suit, and a man in black suit.

Agent Stewart assumed these descriptions were being transmitted because these individuals were covered individuals that had come with defendant Winston.

After he had received the prearranged signal, he was proceeding into the lobby and saw agent Macready who

pointed out three individuals and told him to get those three men.

He looked down towards the cab and saw Corso and Floramo in a yellow cab. He saw Petitioner Mercurio moving away from Petitioners Corso and Floramo. Stewart thereafter ran towards the cab and observed agent O'Donnell just ahead of him hollering:

F.B.I. Out of the cab.

Stewart immediately took Petitioner Corso out of the cab, placed him across the trunk of the cab, and searched him.

Agent O'Donnell was assigned surveillance of the Hilton Hotel in Pittsburgh, Pennsylvania on September 8, 1977. O'Donnell was told that a securities deal was to take place and that there might be individuals there on the outer periphery. He was told they might be look-out personnel.

When O'Donnell received the prearranged signal, he headed towards the hotel and encountered agent Macready, who directed his attention to three individuals standing by a cab. These individuals appeared to be having a conversation. When he began to approach the individuals, one of them started walking off and the other two got into a cab.

When agent O'Donnell approached the cab, he put the upper portion of his body into the cab, showing his credentials and said:

F.B.I. Freeze, don't move.

He ordered Petitioner Floramo out of the cab and turned him over to agent Paskowitz. Agent Paskowitz took a travel bag that was in Floramo's possession and handed it to agent O'Donnell.

At the time Petitioner Floramo was searched, two weapons were extracted from his waistband. In an attempt to determine the status of Petitioners Floramo and Corso

when O'Donnell went to the car, Floramo's counsel questioned agent O'Donnell relative to his actions, asking:

In effect, at that time they were arrested were they not, agent?

MR. JOHNSON: That is objected to as a legal conclusion.

THE COURT: We can assume that they were arrested. It is a logical conclusion.

Petitioners submit that the District Court factually determined as a matter of law that when the agents encountered Petitioners Floramo and Corso at the taxicab outside the Hilton Hotel, they effectuated an arrest as compared to a "stop and frisk." Thus, the search which was conducted on the person of Petitioner Floramo was done so pursuant to the arrest. Therefore, the legality of the search depends on the propriety of the arrest.

A search conducted without a warrant, except in certain narrowly defined exceptions, is, per se, unreasonable. A search incident to a lawful arrest is an exception to the warrant requirement. *Jones v. United States*, 357 U.S. 493, 499, 78 S. Ct. 1253, 1257, 78 L. Ed. 2d 1514 (1958). This exception necessarily presupposes a valid arrest. The Petitioners acknowledge that the search of the person of one arrested is proper as incident to a valid arrest. *Preston v. United States*, 376 U.S. 364, 367, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964). However, if the arrest is invalid because of insufficient probable cause, the search falls with the arrest and the evidence obtained must be suppressed. *United States v. Linnear*, 464 F. 2d 355 (9th Cir. 1972).

The Fourth Amendment requires that no arrest can be made on less than "probable cause." *Henry v. United States*, 361 U.S. 98, 100, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959). Probable cause is established when the facts and

circumstances known to the arresting officer warrant a prudent man in believing that an offense has been committed. *Wong Sun v. United States*, 371 U.S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Once the lawfulness of the search has been questioned, the burden rests on the Government to establish that sufficient probable cause existed to justify the arrest without a warrant. *United States v. Rivera*, 321 F. 2d 704 (2d Cir. 1963). If the arresting officer does not have probable cause at the time of the arrest, nothing which happens thereafter can validate the arrest. *Rios v. United States*, 364 U.S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960).

The Petitioners submit that the actions of agents Stewart, Paskowitz and O'Donnell were as a result of a directive given to them by agent Macready. Petitioners further submit that the observations made by agents O'Donnell and Stewart did not establish sufficient probable cause for their arrest of Petitioners Corso and Floramo.

Therefore, in order to determine the propriety of the arrests one must examine the facts known to agent Macready at the time of his directive in order to determine whether there existed sufficient probable cause to arrest Petitioners Floramo and Corso. The Petitioners submit that no sufficient probable cause existed and that therefore, the arrest of the defendants and the search conducted pursuant thereto was unlawful and illegal and that the items seized should have been suppressed upon their timely-filed motion.

Petitioners state the activities of the agents as set forth hereinabove are dissimilar to a "stop and frisk" situation as expressed in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The agents did not detain the individual in order to question him, but rather immediately arrested the defendants and searched them. The facts relied upon to justify

a warrantless search must be "specific and articulable." See *United States v. Cupps*, 503 F. 2d 277 (6th Cir. 1974). In the instant situation, all we have are observations of Petitioner Floramo appearing to be watching the agents who were transacting business, acting to make that transaction appear legal. We have the further observations of agent Macready who stated that when he looked at these individuals, they had turned abruptly or jumped out of his line of sight. Although these facts may have been sufficient to create a suspicion in the minds of the agents, such that they would be justified in stopping the Petitioners for questioning, these factors alone are insufficient to establish sufficient probable cause to justify an arrest. Even if considered in conjunction with statements of defendant Winston that if he transacted business in Pittsburgh he would have to bring with him an army, there still existed insufficient probable cause to justify the arrest.

Petitioners acknowledge that probable cause does not necessarily mean evidence which would justify a conviction; however, it must be cause which creates more than a mere suspicion. *Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient to warrant a man of reasonable caution in believing that an offense has been or is being committed. *Carroll v. United States*, 267 U.S. 132 at 163, 45 S. Ct. 280, 69 L. Ed. 543 (1925).

The situation in the instant case is dissimilar to a stop and frisk, for, in *Terry, supra*, the court set forth certain guidelines and limitations on a *Terry*-type search. When a police officer observes unusual conduct which leads him reasonably to conclude, in light of his experience, that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently

dangerous, the officer must identify himself as a police officer and, if nothing in the *initial stages* of the encounter serves to dispell his reasonable fear for his own or others' safety, he may then conduct a carefully limited search. *Terry v. Ohio, supra*, 392 U.S. at 30, 88 S. Ct. at 1884. In the instant situation, no such encounter occurred. Rather, the Petitioners were immediately taken from the taxicab and placed under arrest. The search which occurred was conducted pursuant to that arrest. Therefore, in order to justify its propriety, there must have existed probable cause to arrest.

The United States Supreme Court in *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 917 (1968), stated unequivocally that a police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries.

Before he places a hand on the person of a citizen in search of anything, he must have constitutionally adequate, reasonable grounds for doing so.

Sibron, supra, 392 U.S. at 64, 88 S. Ct. at 1903.

In the instant situation, the F.B.I. agents made no preliminary inquiry of the Petitioner Floramo nor were there any observations made which would reasonably cause the agents to believe that the Petitioner Floramo was armed. Rather, the agents immediately upon encountering Petitioner Floramo placed him under arrest.

In the case of a self-protective search for weapons he [the agent] must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous.

Sibron, supra, 392 U.S. at 64, 88 S. Ct. at 1903.

In *Sibron*, the object observation of the arresting officer amounted to seeing the defendant Sibron in associa-

tion with and talking to known narcotics dealers. This the Court found to be insufficient probable cause to justify an arrest. In the instant cause, the observations upon which the F.B.I. agents predicated probable cause involved seeing the Petitioner Floramo in the presence of Petitioners Mercurio and Corso, combined with the fact that when the agents made eye contact with Petitioner Floramo or others, they immediately and abruptly jumped out of the agent's line of sight. The record is barren with regard to any observations made by the agents concerning the physical appearance of the Petitioner Floramo or any other defendant which would reasonably lead one to believe that they were armed and dangerous.

The propriety of a particular arrest must be justified on the facts precisely when the arrest took place. *Rios v. United States, supra*, 364 U.S. at 262, 80 S. Ct. at 1436-1437. The fact that guns were found would not justify the search ab initio.

The Petitioners submit, in light of the Supreme Court's reasoning in *Sibron*, there existed no probable cause to justify the arrest of the Petitioner Floramo.

The facts known to the police officers at the time of his arrest were insufficient to establish probable cause and, therefore, the weapons should have been suppressed. The introduction of the weapons into evidence so prejudicially affected the jury as to deny the Petitioners due process of law.

Conclusion.

For the foregoing reasons, this joint Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

Appendix A.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2051

UNITED STATES OF AMERICA

vs.

MERCURIO, ANGELO JOSEPH,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
D.C. Crim. No. 77-00230-02)

Argued

June 7, 1979

Before: ALDISERT, VAN DUSEN and GIBBONS,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the district court erred in allowing into evidence hearsay statements of a co-conspirator, impliedly implicating the defendant Mercurio, over the objection of defense counsel, absent a showing by independent evidence

(exclusive of the hearsay) that said statements were made: (a) while the conspiracy existed; (b) that the defendant and the declarant were members of the conspiracy; (c) that the declarations were made during the course and in furtherance of the conspiracy, (2) the district court erred in denying defendant Mercurio's motion for directed verdict of acquittal with regard to Count One, (3) the district court erred in denying defendant Mercurio's motions for judgment of acquittal with regard to Counts Two, Three and Four, (4) the court's improper instruction to the jury with regard to Count Four constituted reversible error, and (5) the prosecutor's mis-statements of critical facts and statement of facts in the nature of testimony during his closing argument constituted plain error affecting substantial rights of the defendant Mercurio and was so prejudicial as to deny the defendant due process of law requiring that his conviction be reversed, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
/s/ Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn,
Thomas F. Quinn, Clerk

DATED: JUN 11 1979

Certified as a true copy and issued in lieu
of a formal mandate on July 3, 1979.

Test: /s/ M. Elizabeth Ferguson
Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2052

UNITED STATES OF AMERICA

vs.

FLORAMO, RICHARD J. E.
Richard Floramo,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 77-00230-03)

Argued

June 7, 1979

Before: ALDISERT, VAN DUSEN and GIBBONS,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that the district court erred (1) in allowing into evidence hearsay statements of a co-conspirator, impliedly implicating the defendant Floramo, over the objection of defense counsel, absent a showing by independent evidence (exclusive of the hearsay) that said statements were made: (a) while the conspiracy existed; (b) that the defendant

and the declarant were members of the conspiracy; (c) that the declarations were made during the course and in furtherance of the conspiracy, (2) in denying defendant Floramo's motion to suppress the firearms seized on September 8, 1977, (3) in denying defendant Floramo's motion for acquittal with regard to Count One, (4) in denying the defendant Floramo's motion for judgment of acquittal with regard to Count Four, and (5) in denying defendant Floramo's motion for judgment of acquittal with regard to Count Five, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
/s/ Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: JUN 11 1979

Certified as a true copy and issued in lieu
of a formal mandate on July 3, 1979.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2053

UNITED STATES OF AMERICA

vs.

CORSO, PHILIP V.
Phillip Corso,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 77-00230-04)

Argued

June 7, 1979

Before: ALDISERT, VAN DUSEN and GIBBONS,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the district court erred in allowing into evidence hearsay statements of a co-conspirator, impliedly implicating the defendant Corso over the objection of defense counsel, absent a showing by independent evidence (exclusive of the hearsay) that said statements were made: (a) while the conspiracy existed; (b) that the defendant

and the declarant were members of the conspiracy; (c) that the declarations were made during the course and in furtherance of the conspiracy, (2) the district court erred in denying defendant Corso's motion to suppress firearms seized on September 8, 1977, (3) the district court erred in denying defendant Corso's motions for judgment of acquittal with regard to Counts One and Four, (4) the court's improper instruction to the jury with regard to Count Four constituted reversible error, (5) the prosecutor's mis-statements of critical facts and statement of facts in the nature of testimony during the closing argument constitute plain error affecting substantial rights of the defendant Corso and was so prejudicial as to deny the defendant due process of law requiring that his conviction be reversed, and (6) the district court committed reversible error in refusing to grant a mis-trial based upon the prosecutor's improper attempt to establish a connection between defendant McGrath and defendant Corso, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
/s/ Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

DATED: JUN 11 1979

Certified as a true copy and issued in lieu
of a formal mandate on July 3, 1979.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-2054

UNITED STATES OF AMERICA

vs.

RHODES, BURTON
BURTON J. RHODES,
Appellant

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Crim. No. 77-00230-07)

Argued
June 7, 1979
Before: ALDISERT, VAN DUSEN and GIBBONS,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that (1) the district court erred in allowing into evidence hearsay statements of a co-conspirator, impliedly implicating the defendant Rhodes, over the objection of defense counsel, absent a showing by independent evidence, (exclusive of the hearsay) that said statements were made:

(a) while the conspiracy existed; (b) that the defendant and the declarant were members of the conspiracy; (c) that the declarations were made during the course and in furtherance of the conspiracy, (2) the district court erred in denying the defendant Rhodes' motion for directed verdict of acquittal with regard to Count One, (3) the district court erred in denying defendant Rhodes' motions for judgment of acquittal with regard to Counts Two, Three and Four, (4) the court's improper instruction to the jury with regard to Count Four constituted reversible error, and (5) the prosecutor's mis-statements of critical facts and statements of facts in the nature of testimony during his closing argument, constituted plain error affecting substantial rights of the defendant Rhodes and was so prejudicial as to deny the defendant due process of law requiring that his conviction be reversed, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
/s/ R J Aldisert
Circuit Judge

Attest:

/s/ Thomas F. Quinn
Thomas F. Quinn, Clerk
DATED: JUN 11 1979

No. 79-189

Supreme Court of the United States
FILED

OCT 3 1979

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

ANGELO JOSEPH MERCURIO, RICHARD FLORAMO,
PHILIP V. CORSO AND BURTON RHODES, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-189

ANGELO JOSEPH MERCURIO, RICHARD FLORAMO,
PHILIP V. CORSO AND BURTON RHODES, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

OPINION BELOW

The court of appeals affirmed petitioners' convictions by unreported judgment orders (Pet. App. 33-40).

JURISDICTION

The judgment orders of the court of appeals were entered on June 11, 1979. The petition was filed on August 4, 1979¹ and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹Petitioners attempted to file an application for an extension of time within which to file a petition for a writ of certiorari. The application was returned to petitioners on July 20, 1979, because it was filed out of time under Rule 34(2) of the Rules of this Court.

QUESTIONS PRESENTED

1. Whether there was sufficient evidence of petitioners' participation in the conspiracy so that a co-conspirator's statements were properly admitted into evidence.

2. Whether probable cause supported the arrests of petitioners Corso and Floramo, thereby authorizing the searches incident to their arrests.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted of transporting counterfeit securities in interstate commerce in violation of 18 U.S.C. 2314, of selling counterfeit securities in violation of 18 U.S.C. 2315, and of conspiracy to commit those offenses in violation of 18 U.S.C. 371. Additionally, petitioner Corso was convicted of possessing a firearm after conviction of a felony, in violation of 18 U.S.C. App. 1202(a)(1), and of carrying a firearm while committing a felony, in violation of 18 U.S.C. 924(c); petitioner Floramo was also convicted of transporting a firearm with an altered serial number, in violation of 18 U.S.C. 922(k), and of carrying a firearm while committing a felony, in violation of 18 U.S.C. 924(c). Each petitioner was sentenced to five years' imprisonment on the conspiracy count and to a consecutive ten-year term of imprisonment on the counterfeit security count.² The court of appeals affirmed by judgment orders (Pet. App. 33-40).

1. The evidence is not in dispute. It shows that an undercover FBI agent met with co-defendant Robert Winston on July 26, 1977, near Pittsburgh, Pennsylvania,

²Petitioners Mercurio and Rhodes also received two concurrent ten-year prison terms each. Petitioner Floramo received an additional five-year concurrent term of imprisonment, and petitioner Corso received an additional two-year concurrent term of imprisonment.

and discussed with him the possibility of purchasing counterfeit securities (Tr. 33-34, 59-60).³ Winston told the agent that he could deliver counterfeit securities and that he would sell them for 30% of their face value (Tr. 104, 112, 136-147).

Winston and the agent met again on August 26, 1977 in Fort Lauderdale, Florida, to check sample securities (Tr. 166, 545). At this meeting, Winston recommended that the agent purchase duplicate, rather than stolen, securities because they were more difficult for authorities to trace (Tr. 170-173).

Winston next met with the agent on August 30, 1977, in Pittsburgh, where he told the agent that he had 28 million dollars worth of duplicate securities (Tr. 174, 179, 181-184). Winston showed the agent a blank income certificate and a photocopy of an original income certificate of the Putnam Income Fund (Tr. 213-216, 239-248). The agent agreed to purchase the certificates (Tr. 254). Winston stated that when he brought the securities to Pittsburgh, he was going to bring an "army" with him (Tr. 183), and he later stated that he would have four of his "buddies" with him because he had to watch out for his "hoodlum friends" (Tr. 185).

On September 6, 1977, Winston returned to Pittsburgh and met with the agent to set up the sale of the securities (Tr. 267-271, 546). On September 7, 1977, the agent took Winston to a bank and showed him one million dollars in cash in a safety deposit box (Tr. 279-281). On the morning of September 8, Winston and petitioner Rhodes rented safety deposit boxes at different banks (Tr. 663-664, 985-998, 1359-1364). Winston had rented two rooms

³"Tr." refers to the transcript pages. The original record was not available for the preparation of this opposition. Record references are based on those supplied in the briefs filed in the court of appeals.

at the Hilton Hotel, Rooms 1205 and 1209 (Tr. 663-664). After Winston and Rhodes returned to those rooms, Winston contacted the agent and told him to come to the hotel at 11:30 a.m. (Tr. 284).

When the undercover agent went to the hotel to meet with Winston, several other agents began to look around the hotel lobby to see if they could identify Winston's bodyguards (Tr. 287, 295-296, 549). The agents first noticed petitioner Mercurio because, as soon as he saw them, he turned abruptly and looked into a display window (Tr. 296, 550). The agents also noticed petitioner Corso when he too turned abruptly as they passed (Tr. 297-298, 552). The agents also noticed a third individual in a green jacket who turned suddenly to study a blank wall as the agents approached (Tr. 300-301, 553-554). At this point, the agents entered a restroom and broadcast descriptions of the men they had noticed. When they left the restroom they again saw the individual in the green jacket who again avoided eye contact with the agents by picking up a pamphlet from a display stand (Tr. 302-303, 555-556). The agents proceeded toward the hotel restaurant and again observed petitioners Mercurio and Corso, who turned suddenly to face away from them (Tr. 302-306, 556-558).

When the agents returned to the hotel lobby, they saw petitioners Corso, Mercurio, and Floramo sitting together (Tr. 312-313, 562). The agents crossed the lobby and sat down; and when one of them next looked back, he saw that Floramo and Mercurio had stationed themselves at the top of a stairwell (315-317, 563-564). When the agent looked directly at them, they jumped out of his line of sight (Tr. 316-317). Winston then entered the lobby with a briefcase and was arrested (Tr. 327, 567-568, 659). The briefcase seized from Winston contained 94 counterfeit securities of the Putnam Income Fund with a face value

of nearly 23 million dollars (Tr. 1082-1088). As Winston was arrested, an agent looked to the top of a flight of stairs and saw petitioner Floramo push petitioner Mercurio quickly out of the agent's line of sight (Tr. 568-569). The agent left the hotel lobby to search for other agents to assist him, and when he returned to the lobby, he saw the individual in the green jacket and petitioners Corso, Mercurio and Floramo talking together near the hotel registration desk (Tr. 570-571). The agent left the hotel by a back entrance and went to the side of the building where he saw petitioners Floramo and Corso at the taxi stand (Tr. 571-573). He heard Corso ask Floramo, "What's going on?", and Floramo answer, "I don't know." (Tr. 573). Meanwhile, petitioner Mercurio stood in the middle of the street craning his neck to watch the agents take Winston to a car (Tr. 573-574). At this point, the other agents arrived and arrested petitioners Corso and Floramo in a taxi and petitioner Mercurio on the street (Tr. 574-575, 706, 728, 764). The agents discovered a .32 caliber revolver on petitioner Corso's person and .38 caliber and .357 caliber handguns on petitioner Floramo (Tr. 712-714, 733-737, 749-750). Petitioner Floramo also carried a flight bag that contained surgical gloves and three boxes of ammunition, one .32 caliber, one .357 caliber, and one .38 caliber (Tr. 731-732). All of the weapons were loaded, and there were six rounds missing from each box of ammunition taken from Floramo (Tr. 713-714, 732).

At this time, Corso said he did not know Floramo and had only hitched a ride in his taxi (Tr. 752, 789-791). He claimed he was in Pittsburgh to see a hockey game (789-791). Floramo also denied knowing Corso, and stated that he found the guns in the cab and placed them in his waist band to avoid discharging them accidentally (Tr. 789-790). Mercurio also said he did not know Floramo or

Corso (Tr. 771). Petitioner Rhodes was arrested approximately one week later, and at the time of his arrest denied knowing Floramo, Corso, or Mercurio (Tr. 1056-1057).

Additional evidence at trial established a close relationship between petitioners. It revealed that Rhodes and Corso had shared an apartment in 1974 (Tr. 1068-1069). Telephone records showed numerous calls between telephones connected with Winston and petitioners Rhodes, Corso, and Mercurio during August and September 1977 (Tr. 1774-1790). Shortly after his arrival in Pittsburgh, on September 8, petitioner Mercurio was observed entering Room 1205 at the Hilton Hotel in the company of Winston (Tr. 803-806). When petitioner Mercurio was searched incident to his arrest, the agents discovered two pieces of paper. The first had petitioner Corso's name on it, the name of a hotel in the Pittsburgh area, and telephone numbers (Tr. 773-774, 803-806). Corso was shown to have rented a room at that hotel for three individuals (Tr. 1110-1114). The second piece of paper found on Mercurio had the name "Burt" on it and petitioner Rhodes' telephone number (Tr. 775, 1057). When petitioner Corso was arrested, the agents found an address book containing the name "Sonny", an alias for petitioner Mercurio (Tr. 775). Agents searched that hotel room as well as the adjoining room, and discovered a prescription bottle with petitioner Rhodes' name on it and an address book containing Rhodes' name and the name of an employee of Winston's (Tr. 876-877, 925).

Petitioners Rhodes and Mercurio testified on their own behalf at trial (Tr. 2153-2281, 2289-2389). Both testified that Rhodes had arranged for them and Corso to act as Winston's bodyguards in Pittsburgh on the day of the arrest, but both denied any knowledge of the illegal transaction in which Winston was involved.

ARGUMENT

1. Petitioners contend that Winston's statement that he was going to bring an "army" of four of his "buddies" to Pittsburgh with him was hearsay and not admissible against them because there was not sufficient independent evidence of their participation in a conspiracy. The evidence outlined above, independent of the alleged hearsay, is sufficient, however, to demonstrate petitioners' involvement in a conspiracy.⁴

The independent evidence showed that Winston agreed to sell duplicate securities for a large sum of money. On the day and place of the sale, FBI agents noticed four individuals who obviously tried to avoid being seen while watching the agents. When petitioners were arrested, two of them were armed, and they all falsely denied knowing each other and gave false explanations for their presence in Pittsburgh. One of the weapons had an obliterated serial number (Tr. 712-714, 733-737, 749-750) that would make it difficult to trace. Two of the petitioners had gloves (Tr. 731-732, 767-768) that would help them avoid leaving fingerprints. Petitioner Rhodes helped Winston to rent safety deposit boxes on the day of the sale (Tr. 663-664, 985-998, 1354-1364). Petitioner Mercurio had been seen entering Winston's room at the Hilton (Tr. 803-806), and petitioner Corso had rented a room at another Pittsburgh hotel for three individuals (Tr. 1110-1114). There were numerous telephone calls between the conspirators during the month prior to the sale (Tr. 1774-1790). Thus, there was sufficient independent evidence of petitioners' participation in the conspiracy to justify the

⁴Winston was tried with petitioners, and the challenged statements were clearly admissible against him. Fed. R. Evid. 801(d)(2)(A). Petitioners apparently do not contest that the statements were admissible at trial but claim (Pet. 21) that the court erred by not instructing the jury that they were admissible only against Winston.

trial court's admission of co-conspirator Winston's statement made in furtherance of the conspiracy. This determination was for the trial court alone, and there is no requirement that the jury be given limiting instructions on co-conspirator statements. *United States v. James*, 590 F. 2d 575, 579-590 (5th Cir. 1979) (*en banc*), cert. denied, Nos. 78-1412, 78-6369, 78-6431 (June 4, 1979); *United States v. Bell*, 573 F. 2d 1040, 1043 (8th Cir. 1978); *United States v. Stanchich*, 550 F. 2d 1294, 1297-1298 (2d Cir. 1977); *United States v. Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977); *United States v. Trowery*, 542 F. 2d 623, 627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977).⁵

2. Petitioners Floramo and Corso⁶ contend that the trial court erred when it did not suppress the weapons

⁵There is a semantic difference among the circuits as to the amount of proof of participation in a conspiracy that is required before co-conspirator statements can be admitted. The First, Second, Third and Eighth Circuits have stated that the conspiracy must be proven by a preponderance of the evidence. *United States v. Bell*, *supra*, 573 F. 2d at 1044; *United States v. Petrozziello*, *supra*, 548 F. 2d at 23; *United States v. Stanchich*, *supra*, 550 F. 2d at 1298; *United States v. Trowery*, *supra*, 542 F. 2d at 627. The Fifth Circuit, on the other hand, has stated that a conspiracy must be proven by "substantial" evidence. *United States v. James*, *supra*, 590 F. 2d at 581. We do not view this difference in language as creating a conflict in the circuits of sufficient importance to merit review by this Court. In any event, this case is not appropriate to resolve this arguable conflict because the court of appeals below uses the preponderance test and thus gave petitioners the benefit of the test arguably more favorable to them. See *United States v. Trowery*, *supra*.

⁶The petition raises this claim (Pet. 21) on behalf of all petitioners. However, petitioners Mercurio and Rhodes clearly have no standing to object to the search. See *Rakas v. Illinois*, 439 U.S. 128 (1978). We further note that petitioners Mercurio and Rhodes did not raise this claim in the court of appeals and there are no unusual circumstances that would lead this Court to depart from its normal practice of refusing to consider questions not raised below. See *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

found during a search incident to their arrest because the arrest was not based on probable cause. The facts outlined above are, however, sufficient to justify a prudent officer's belief that an offense had been committed, so the arrests were clearly valid.

At the time of the arrests, the agents knew that Winston intended to sell a large amount of duplicate securities in the hotel that day and that he had promised to bring an "army" of "buddies" with him for protection. Armed with that knowledge, the agents observed four individuals who were obviously trying to watch them without being seen. These four individuals engaged in erratic behavior such as studying blank walls, jumping "like jackrabbits" (Supp. Tr. 74-75, 131)⁷ to avoid being seen, and pushing one another out of the agents' line of sight. The four were seen talking together, and they attempted to leave the hotel shortly after Winston was arrested. Petitioner Mercurio stood in the middle of the street and craned his neck to watch Winston as he was led to an FBI car. These circumstances more than suffice to establish probable cause to believe that the four men were the four armed bodyguards that Winston promised to bring. The Constitution does not require the agents to have warrants to arrest individuals they have probable cause to believe have committed a felony in their presence. *United States v. Watson*, 423 U.S. 411 (1976). A search incident to a lawful arrest is constitutional. See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752, 762-763 (1969). In this case, the search of petitioners Floramo and Corso for weapons was incident to a lawful arrest based on probable cause.

⁷"Supp. Tr." refers to the transcript of the hearing on the motion to suppress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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